Police Headquarters for consideration by the first and second appellants, and that after consideration both applications were refused.

It is manifestly evident from this reply of August 30, 1984 that the third respondent as the licensing authority under the provisions of section 27(2) of the Act had abdicated his functions by transmitting the applications for consideration and determination by the first and second respondents. A.S.P. Alwi in giving evidence tried to explain his action by relying on what he referred to as departmental procedure in submitting the applications to the Contingent Police Headquarters. This is as lame an excuse as one can think of and we are left to ponder on the conundrum that would ensue as a result of this soi-disant departmental procedure if the licensing authority in the exercise of his discretion was amenable to the issue of a licence but is vetoed by his superiors in the person of the first and second respondents, or contrariwise. He would then be acting under dictation and in consequence fettering the discretion legislatively vested in him and which must be exercised by him, and him alone, in accordance with the provisions of subsection (2) of section 27 of the Act [*Simms Motor Units Ltd.* v. *Minister of Labour and National Service*[1]; *Reg.* v. *Anderson, Ex parte Ipec-Air Pty. Ltd.*[2] 177; *Reg.* v. *Police Complaints Board, Ex parte Madden.*[3]]

The other point is that the first respondent is the appellate authority to entertain an appeal against the refusal of a licence but he has in this case purported to act at first instance by considering and determining the original applications, thereby depriving the appellant of his statutory right of appeal. This whole thing is further compounded by the fact that the refusal of the applications made on August 10, 1984 was only intimated in writing to the appellant at 4.30 p.m. on August 30, 1984 itself, half-an-hour before the lion dance was scheduled to commence and an hour-and-a-half before the dinner. We need say no more than that this in any event by itself clearly and effectively curtailed the appellant's statutory right of appeal to the first respondent against the refusal of his applications. His right of appeal was rendered wholly nugatory as, first, there was no one to appeal to since the first respondent, the statutory appellate entity himself, had stepped into the arena at first instance by usurping the functions of the third respondent, and second, the time factor was such that even if there was no other impediment to an appeal to the first respondent, it would have been absolutely impossible to have an appeal lodged and determined in time for the dinner and the lion dance scheduled to commence half-an-hour after receipt of the intimation of refusal from the third respondent, and that too on a Saturday afternoon. We would stress that section 27(7) of the Act specifically provides a minimum period of forty-eight hours after the refusal of a licence under the provisions of subsection (2) within which an appeal to the first respondent which must be in writing has to be made.

Mr. Karpal Singh for the appellant indicated that he was not in the circumstances proceeding with the question of the equipment seized by the fourth respondent and it is accordingly not necessary for us to deal with this aspect of the matter.

In the event and for the reasons we have given we allowed this appeal at the conclusion of argument with costs here and below, and declared that the refusal of the licences applied for by the appellant was made by the wrong authority, that the first respondent who is the appellate body had wrongly assumed authority in this regard, and that the intimation to the appellant of the refusal of his applications was made in a wholly unreasonable period of time so as to preclude any appeal by him against it. The deposit in court lodged by way of security will be paid out to the appellant.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

LEONG HONG KHIE v. PUBLIC PROSECUTOR AND TAN GONG WAI v. PUBLIC PROSECUTOR

[F.C. (Wan Suleiman, Seah & Hashim Yeop A. Sani F.JJ.) December 3, 1984]

[Kuala Lumpur – Federal Court Criminal Appeals Nos. 21 and 22 of 1984]

Criminal Law and Procedure – Charge of trafficking in dangerous drug – Evidence of informers – Informers not called to give evidence in Court – Hearsay Evidence – Whether evidence admissible as res gestae – Appeal allowed.

Evidence – Hearsay Evidence – Evidence of informers – Informers not called to give evidence in

Court – Whether evidence admissible as res gestae – Evidence Act, 1950, ss. 6 & 32.

These were appeals against the conviction of the appellants on a charge of trafficking in a dangerous drug. The principal evidence against the appellants was given by a Senior Customs Officer who stated that he acted on information from informers. It was sought at the trial to introduce evidence of oral statements made to the witness by two informers, neither of whom was called to testify. The defence objected to the evidence on the ground that it contravened the rule against the admission of hearsay evidence and also because it did not fall within any of the recognised exceptions thereto. The learned trial judge ruled that the statements were admissible and convicted the appellants – See [1985] 1 M.L.J. 355. The appellants appealed.

Held: (1) the general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. In Malaysia certain exceptions have been set out in Section 32 of the Evidence Act, 1950, but these statutory provisions were not relied in this case;

(2) the general proposition laid down by the Privy Council in the case of *Subramaniam* v. *Public Prosecutor*(2) must be read subject to this condition *viz.* that the statement must be directly relevant in considering the state of mind of the witness to whom it is made. In other words the proposition could only apply when the mental state of the witness evidenced by the statement was itself directly in issue at the trial;

(3) in this case the prosecution had failed to satisfy this strict test. Since the mental state of both the appellants was not in issue at the trail, the condition had not been satisfied. All the statements allegedly made by the informers to the witness are to be treated as hearsay evidence and therefore inadmissible in law and ought to have been rejected by the learned trial judge;

(4) none of the reasons given by the learned judge come within the statutory exception to the hearsay rule contained in section 32 of the Evidence Act 1950 and the res gestae rule does not and cannot apply to the facts of the case;

(5) the hearsay evidence of the informers was so interwoven with the testimony of the principal prosecution witness that its misreception had seriously prejudiced the fair trial of the appellants and resulted in a miscarriage of justice. Having regard to the other oral evidence, it would be unsafe to allow the conviction to stand, as there was no satisfactory oral evidence to support the conviction.

Cases referred to:

(1) *Teper* v. *R.* [1952] A.C. 480, 486.
(2) *Subramaniam* v. *Public Prosecutor* [1956] M.L.J. 220.
(3) *Mawaz Khan* v. *The Queen* [1967] 1 A.C. 454.
(4) *Ratten* v. *The Queen* [1972] A.C. 378.

FEDERAL COURT.

R. Rajasingam for the appellant, Leong Hoong Khie.

Darshan Singh for the appellant, Tan Gong Wai.

Fong Seng Yee (Senior Federal Counsel) for the Public Prosecutor.

Seah F.J. (delivering the Judgment of the Court): After considering the submissions of learned Deputy Public Prosecutor we quashed the conviction as well as the sentence, allowed the appeal and ordered that both appellants be discharged and acquitted. We indicated that we would give our reasons at a later date and this we now do.

Both the appellants were jointly charged for trafficking in dangerous drugs, to wit 420.7 grammes of heroin in contravention of paragraph (a) of sub-section (1) of section 39B of the Dangerous Drugs Act 1952 on April 18, 1981. They were found guilty by the High Court at Penang on March 31, 1984 and sentenced to death.

The foundation of the prosecution case was based mainly on the oral testimony of Liew Chuan Siew (P.W.1), a Senior Customs Officer attached to the Preventive Branch, Penang and his evidence may be summarised as follows:

(a) *On 15.4.1981 P.W.1 received a telephone call from Informer No. 817 suggesting a meeting.* On the following day, in the company of his superior officer, Mohamed Saad (P.W.3) they met Informers Nos. 817 and 822 at Peking restaurant, Penang where *P.W.1 and P.W.3 were informed by the 2 informers that there would be a transaction involving 8 lbs of heroin and the respective role the informers would play.*

(b) *On 18.4.1981 P.W.1 got another phone call requesting an immediate meeting* and all four of them met at the same restaurant. *The informers told P.W.1 and P.W.3 that the proposed transaction would take place that afternoon at Springtide Hotel, Penang and that they would arrive in a Mazda car No. AAK 3908 accompanied by Tan Gong Wai (later identified as appellant (Tan)).*

(c) As a result of this information, P.W.1 led a party of customs officers to Springtide Hotel arriving there at about 12.45 p.m. Some time later, a Mazda car arrived and three persons alighted, viz. the 2 informers and appellant (Tan). They entered the restaurant and engaged in conversation. After fifteen minutes they left but just as they were doing so, *one of the*

informers indicated by a hand signal to P.W.1 to stay behind.

(d) *After a while P.W.1 received a phone call from one of the informers suggesting that P.W.1 take his party of customs officers to the junction of Scotland Close and Jalan Scotland, Penang.* P.W.1 and his party proceeded to the junction and waited. At 2.30 p.m. P.W.1 saw the Mazda car approaching and turned into Ayer Itam Road stopping in front of No. 8, Medan Goh Guan Ho. P.W.1 saw three male Chinese came out of the car and went into the house. From his ambush position P.W.1 (which was about 30 yards away) said that he could see any person going in and leaving house No. 8.

(e) At 3.30 p.m. P.W.1 saw one of the informers and appellant (Tan) leave the house, entered into the Mazda car and drove away. Some fifteen minutes afterwards, the other informer came out of the house and walked towards Taman Race Course. *P.W.1 approached him and was informed by the informer that the Mazda car would return soon with "the stuff", viz. heroin.* After saying this, the informer went back into the house and P.W.1 to his ambush position.

(f) At 4.30 p.m. the Mazda car returning and stopped in front of No. 8 Medan Goh Guan Ho. P.W.1 saw three persons alighted, viz. the informer, appellant (Tan) and a third person whom he did not know but he was seen carrying a black plastic bag. He was later identified as appellant (Leong). All three persons then went into the house. A few minutes later, a motor-cyclist arrived and he too entered the house. He was P.W.2, Tay Liang Boo.

(g) After directing his officers to position themselves behind the house to cut off any attempt to escape, P.W.1 led his party and rushed into house No. 8, shouting "Customs" as they entered. P.W.1 said he saw appellant (Leong) throwing away the black bag and he recovered it from the floor in the ball. On opening, he found two packets containing light brown granular substance which he suspected to be heroin. His suspicion was confirmed by the chemist report (P.9).

(h) In the hall P.W.1 found two women, viz. Jenny Goh and Ong Saw Hoon (f) (P.W.9), in addition to the other four male Chinese seen entering house No. 8 earlier on.

(i) Following this the 2 appellants (Leong and Tan) were duly arrested and jointly charged for trafficking under the Dangerous Drugs Act 1952.

The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence. To quote Lord Normand in *Teper* v. *R.*[1]

> "The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost."

In our opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony. Notwithstanding this general rule certain exceptions have been recognised upon the ground of necessity or convenience. In Malaysia, these exceptions are set out in section 32 of the Evidence Act 1950. Since neither the learned counsel for the appellants nor the learned DPP seems to rely on any of these statutory provisions no more need be said about them in this judgment. However, hearsay evidence may in certain very limited circumstances be admitted within the general proposition expounded by the Privy Council in the case of *Subramaniam* v. *Public Prosecutor.*[2] The appellant in that case was charged with being in possession of firearms without lawful excuse and his defence was that he was acting under duress in consequence of threats uttered by the terrorists. The trial judge would not allow the accused to narrate in the witness box what had been said by the terrorists and the Privy Council advised that the conviction should be quashed because the "statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes".

In the early part of its opinion the Privy Council said:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when

it is proposed to establish by the witness, not the truth of the statement, but the fact that it was made."

This statement has been accepted by the Privy Council in *Mawaz Khan* v. *The Queen*[3] and *Ratten* v. *The Queen*.[4] In *Ratten* case Lord Wilberforce said at page 387:

"A question of hearsay only arises when the words spoken are relied on testimonially, i.e. as establishing some facts narrated by the words."

The learned Deputy Public Prosecutor appeared to have conceded that all the statements allegedly made by the informers to P.W.1 (which we have underlined) were to be regarded as hearsay but he argued before the learned judge and repeated the same argument before us that he sought to have these statements admitted although both these informers were not called as prosecution witnesses, not to prove the truth of their contents but the fact that they were made. The learned Deputy Public Prosecutor purported to rely on the *Subramaniam* case (*supra*). In our opinion, the general proposition laid down by the Privy Council in that case must be read subject to this condition, *viz.* that the statement must be directly relevant in considering the state of mind of the witness to whom it had been made. In other words, the proposition could only apply when the mental state of the witness evidenced by the statement was itself directly in issue at the trial. What a witness said or heard said might well be the best and most direct evidence of that witness's state of mind. Support for this very restricted construction may be found in the *Subramaniam* case (*supra*) where the Privy Council said at page 222:

"The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes."

Now, what was the purpose of introducing these statements allegedly made by the informers to P.W.1 on April 15, 1981, April 16, 1981 and April 18, 1981? The learned Deputy Public Prosecutor had given his reasons for doing so and we need not repeat them. Suffice for us to say that in our opinion, the learned Deputy Public Prosecutor had failed to satisfy this strict test laid down in *Subramaniam* case (supra). Since the mental state of both the appellants was not in issue at the trial, this condition had not been satisfied. Having failed to comply with this requirement, in our judgment, all the statements allegedly made by the informers to P.W.1 (which we have conveniently emphasised) are to be treated as hearsay evidence and therefore inadmissible in law. They ought to have been rejected by the learned judge.

In the ruling given at the conclusion of the trial the learned judge gave four reasons for holding that these statements allegedly made by the informers to P.W.1 were relevant and admissible:

(1) To rebut the defence of the accused persons;

(2) To explain the reaction of P.W.1 in acting on those statements in the manner he did;

(3) They formed part of the transaction leading up to the principal act, viz. trafficking in dangerous drugs and

(4) They were antecedent transactions and as such, could not be a narrative of what happened.

With respect to the learned judge, none of these reasons constituted a valid one in law for admitting hearsay evidence within the proposition formulated by the Privy Council in *Subramaniam* case (*supra*). Nor did any of them come within the statutory exception to the hearsay rule contained in section 32 of the Evidence Act 1950.

Next, the learned judge held that these statements allegedly made by the informers to P.W.1 on various dates prior to the arrest of the appellants on April 18, 1981 could be admitted under section 6 of the Evidence Act 1960 as part of the res gestae. Reliance appears to have been placed on the case of *Ratten* v. *The Queen* (*supra*). In that case, a woman's voice was heard on the telephone "Get me the police please" and gave the address 59 Mitchell Street. Before the operator could make the connection to the police the caller hung up. Shortly afterwards the caller was shot dead by her husband who asserted that his gun went off accidentally while he was cleaning it. The Privy Council held that the words were admissible as part of the *res gestae*. These words uttered by the deceased woman were given by the telephone operator who was called as a prosecution witness. In that case the cause of death was in issue and the decision of the Privy Council could be explained on the ground it might be treated as coming within sub-paragraph (a) of section 32 of the Evidence Act 1950. The facts of that case are clearly different from the present case.

Furthermore, the authorities appear to establish that the res gestae rule should be applied strictly to prevent concoction and fabrication. No binding authority has been cited to prove that hearsay evidence spanned over a period of several days had been admitted as part of the res gestae. In *Ratten* case (*supra*) Lord Wilberforce seems to rule against it and His Lordship said:

"Conversely, if he (trial judge) considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he (trial judge) should exclude it. And the same must in principle be true of statements made before the event."

We therefore hold that the res gestae rule does not and cannot apply to the facts of this case.

Although much research and efforts appeared to have been made by the learned judge in writing his ruling and judgment we regret we are unable to agree with his conclusion. In our judgment, none of the grounds relied on by the learned judge was valid in law or could be supported by the well-recognised authorities. For these reasons, we are of the opinion that the statements allegedly made by the informers to P.W.1 ought to have been ruled inadmissible in law.

After discarding what had been improperly admitted we had to decide whether the remaining oral evidence produced at the trial was sufficient to support the conviction. As against the appellant (Leong) there was the testimony of P.W.1 who alleged that he saw appellant (Leong) carrying a black plastic bag which was later found to contain the dangerous drug into the house at No. 8 Medan Goh Guan Ho. P.W.1 also claimed to see the appellant (Leong) throwing the bag away when P.W.1 stormed into the house with a party of Customs Officers. This piece of evidence of P.W.1 was however, contradicted by P.W.2 (Tay Liang Boo) and P.W.9 (Ong Saw Hoon). If P.W.1 had actually seen what he claimed, no satisfactory explanation was offered why he should question those present in the living-room (a) Who was the owner of the bag? (b) Who was the owner of its contents? (c) Who put the bag on the floor? In our opinion, such questions do not appear to be consistent with the claim of P.W.1 of having seen appellant (Leong) carrying and throwing away the black plastic bag.

The other oral evidence purporting to connect the appellant (Tan) with the charge was given by P.W.2. At the time which he gave his testimony P.W.2 was serving a prison sentence for possession of dangerous drugs. When he was first called as a prosecution witness his testimony did not implicate both the appellants in any way. The Deputy Public Prosecutor applied to treat him as a hostile witness and sought leave of the court to impeach him under section 155(c) of the Evidence Act 1950 by reference to a previous statement (ID7) alleged made by him to P.W.3 (Mohd. Saad), Superintendent of Customs (Preventive Branch) Penang. Leave was duly given by the learned judge and P.W.2 was cross-examined by the learned Deputy Public Prosecutor but defence counsel reserved their questioning of this prosecution witness. Sometime later, P.W.2 intimated to the Court that he wished to speak the truth and he was recalled and reaffirmed. After giving evidence incriminating both the appellants the learned Deputy Public Prosecutor applied to the Court for leave to examine P.W.2 with a view to establishing that the statement ID7 was the truth. Despite objection by learned counsel for the defence the learned judge granted the application. Under cross-examined by learned counsel for the appellant (Tan) P.W.2 said:

"Yes, I was high on drugs when I made ID7 and also, I made ID7 because they said I would be released. By "they" I mean the C.Os (Customs Officers)."

In reply to answer put by learned counsel for the appellant (Leong) P.W.2 said:

"Yes, I was induced to make ID7 in that I was promised by the Customs that if I made a statement I would be released."

In our opinion, it was plain that P.W.2 was induced by the Customs Officers to make ID7 and the learned judge was right to rule that it had not been proved to have been made voluntarily. It follows that ID7 was not admissible in evidence. As such, no reference to it or its contents should have been made by the learned Deputy Public Prosecutor at the trial. In our opinion, P.W.2 appears to be an unreliable witness.

In our judgment, the hearsay evidence of the informers was so interwovened with the testimony of the principal prosecution witness P.W.1 that its misreception had seriously prejudiced the fair trial of the appellants and had resulted in a miscarriage of justice. Having regard to the other oral evidence which we have alluded to and commented upon, we think it unsafe to allow the conviction to stand as we are of the opinion that there was no satisfac-

tory oral evidence to support the conviction. For the above reasons, we do not direct a new trial but quashed the conviction and sentence and ordered that both appellants be discharged and acquitted.

Order accordingly.

Solicitors: *R. Rajasingam & Co.; Darshan Singh & Co.*

ABDUL WAHID BIN DATO HAJI ABDUL RAHIM GULAM RASOOL SHAIK & ORS. v. SHARIAHBIBI BINTI IBRAHIM MYSOORY & ORS.

[O.C.J. (Eusoff Chin J.) May 12, 1985]

[Kota Bharu – Civil Suit No. 131 of 1976]

Islamic Law – Mard-al-Maut or death-illness – Transfer of Shares in match factory at under value – Donor suffering from lung cancer – Reasonable probability of death – Transfers set aside.

In this case the plaintiffs brought an action to invalidate the transfer of shares in a match factory at an under value by Dato Haji Abdul Rahim Gulam Rasool Shaik (since deceased) to four of the defendants. At the time of the transfer the deceased was suffering from acute lung cancer. It was argued that the transfers were void under the doctrine of *mard-al-maut.*

Held: (1) on the evidence in this case the deceased having known that he had lung cancer and being aware that the cancer was a very serious illness, believed that his death was imminent, and in contemplation of his death he had taken action to transfer 298 of his 300 shares in the Kelantan Match Factory to four of his sons without the consent of the other heirs to the estate;

(2) on the evidence also there was no improvement in the health of the deceased. His health continued to deteriorate until his death. The deceased was therefore under apprehension of imminent death and nothing had happened to him that would interrupt such apprehension from his mind until he died;

(3) the transfers of the shares to the four defendants were void under the doctrine of *mard-al-maut* and judgment must be given for the plaintiffs.

Cases cited in argument:

(1) *Haji Embong b. Ibrahim & Ors.* v. *Tengku Nik Maimunah Hajjah binte Almarhum Sultan Zainal Abidin & Anor.* [1980] 1 M.L.J. 286.
(2) *Fazal Ahmad & Anor.* v. *Mt. Rahim Bibi & Ors.* A.I.R. 1919 Allahabad 148.
(3) *Sharof Ali Abdul Ali Shat* v. *Safiaboo & Ors.* A.I.R. 1936 Madras 432.
(4) *Eh Riyid* v. *Eh Tek* [1976] 1 M.L.J. 262.
(5) *Tuan Man & Anor.* v. *Che Som & Ors.* (1932) 1 M.C. 134.
(6) *Fatima Bibi & Ors.* v. *Sheikh Ahmad Baksh* L.R. 35 I.A. 67.
(7) *Anjalai Ammal* v. *Abdul Kareem* [1969] 1 M.L.J. 22.
(8) *Thorp* v. *Holdsworth* (1876) 3 Ch. D. 637.
(9) *Kiaw Aik Hang* v. *Tan Tien Choy* [1964] M.L.J. 99 C.A.
(10) *Subrahmanyan* v. *Subba Rao* A.I.R. 1948 P.C. 95.
(11) *Re Ismail bin Rentah, Deceased; Haji Hussain* v. *Liah & Ors.* [1940] M.L.J. 98.
(12) *Safia Begum* v. *Abdul Rajak* A.I.R. 1945 Bombay 438.
(13) *Amanullah bin Haji Ali Hasan* v. *Hajjah Jamilah* [1975] 1 M.L.J. 30.
(14) *Jinjara Khatun* v. *Mohammad Fakirulla Mia* (1921) I.L.R. 49 Calcutta 477.
(15) *Re Wrightson* [1908] 1 Ch. 789.
(16) *Blay* v. *Pollard & Morris* [1930] 1 K.B. 628, 634.
(17) *Ibrahim Goolam Ariff* v. *Saiboo* (1907) L.R. 34 I.A. 167.
(18) *Fazal Ahmad* v. *Rahim Bibi* (1918) I.L.R. 40 All. 238; 51 I.C. 638.
(19) *Sarabai* v. *Rabiabai* (1905) I.L.R. 30 Bombay 537.
(20) *Hassan Ali Degumiya* v. *Ruh Ullah* A.I.R. 1925 Bom. 305; 27 Bom. L.R. 184.
(21) *Khajooroonnissa* v. *Rowshan* (1876) I.L.R. 2 Cal. 184.
(22) *Bafatun* v. *Bilaiti Khanum* (1903) I.L.R. 30 Cal. 683.

CIVIL SUIT.

Varghese George for the plaintiffs.

C.H. Liew for 1st and 4th defendants in C.S. No 131/76 and defendant in C.S. No 20/79,

Dato Wrigglesworth for the 2nd and 3rd defendants

Cur. Adv. Vult.

Eusoff Chin J.: On October 1, 1980 by consent of the parties, Civil Suit No. 20 of 1979, was ordered by this High Court to be consolidated, and to proceed as one action, with Civil Suit No. 131 of 1976

The three plaintiffs in both suits are the same people being beneficiaries in the estate of the late Dato Haji Abdul Rahim Gulam Rasool Shaik (deceased). They seek to invalidate the deceased's transfer of 298 of his shares in Kelantan Match Factory Limited to the defendant in Civil Suit No. 20 of 1979, and to the 2nd, 3rd and 4th defendants in Civil Suit No. 131 of 1976 on October 11, 1966 (this date was agreed in the statement of agreed facts). The claim in both suits was based on